No. 07-116

In the Supreme Court of the United States

STEPHEN S. ADAMS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' home-to-work commutes in government-owned vehicles are compensable work under the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, and Section 4(a) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(a).

2. Whether Section 4(b)(2) of the Portal-to-Portal Act of 1947, 29 U.S.C. 254(b)(2), entitles petitioners to compensation for their home-to-work commutes based on a "custom or practice" of compensating home-to-work driving of other types of employees who, unlike petitioners, were not classified as exempt from the Fair Labor Standards Act of 1938.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 471 F.3d 1321. The opinion of the Court of Federal Claims (Pet. App. 11a-58a) is reported at 65 Fed. Cl. 217.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2006. A petition for rehearing was denied on March 14, 2007 (Pet. App. 59a-60a). On May 31, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 27, 2007, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, generally requires that an employer pay overtime compensation when it employs a non-exempt employee for a workweek longer than forty hours. 29 U.S.C. 207(a), 213(a)(1). The Act does not define "work" or "workweek," and this Court's early cases construed the term "work" broadly as activity "controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." See *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 25 (2005) (*IBP*) (citation omitted). The substantial and unexpected scope of employer liability under those early decisions led Congress to enact the Portal-to-Portal Act of 1947, 29 U.S.C. 251 *et seq.*, to narrow the coverage of the FLSA. See *IBP*, 546 U.S. at 26-27, 41; 29 U.S.C. 251(a).

As is relevant here, Section 4(a) of the Portal-to-Portal Act, 29 U.S.C. 254(a), relieves employers from FLSA overtime liability for the following employee activities, unless such activities are compensable under a contemporaneous contract or "custom or practice" in effect at the place of employment (29 U.S.C. 254(b)):

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities,
>
> which occur either prior to the time on any particular workday at which such employee commences, or sub-

> sequent to the time on any particular workday at which he ceases, such principal activity or activities.

29 U.S.C. 254(a).

Regulations promulgated by the United States Department of Labor (DOL) and Office of Personnel Management (OPM) explain that "[a]n employee who travels from home before his regular workday and returns to his home at the end of the workday is engaged in ordinary home to work travel," which is a "normal incident of employment" and "not worktime." 29 C.F.R. 785.35; see 5 C.F.R. 551.422(b); 29 C.F.R. 790.7(c). Such home-to-work travel, however, does not encompass an employee's transit to a work site that occurs after the employee has traveled from his home to an employer-specified location and started to perform the day's work. Where an employee is "required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools," the "travel from the designated place to the work place" is compensable as work. 29 C.F.R. 785.38.

2. Petitioners are 6610 individuals (of approximately 14,000 plaintiffs in this case) who claim to have been employed as criminal investigators by five federal law enforcement agencies, and who brought suit in the Court of Federal Claims alleging that the government failed to pay them overtime compensation as required by the FLSA. Pet. 2, 6.[1] The parties subsequently settled all relevant claims in the plaintiffs' consolidated lawsuits affecting petitioners except the claim that time spent commuting between home and work in a government vehicle was work subject to overtime compensation.

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[1] For purposes of this brief, we accept petitioners' representations (Pet. 2, 6) that all 6610 petitioners are criminal investigators.

a. After the parties filed motions for partial summary judgment on this claim in 2002 and 2004, the Court of Federal Claims entered a Fed. R. Civ. P. 54(b) partial final judgment in favor of the government. Pet. App. 11a-58a. The court explained that the 2002 motion governed overtime claims of certain Secret Service and Customs Service employees who performed law enforcement-related work but were not criminal investigators (GS-9/11 plaintiffs) and who claimed to have been required to drive government vehicles between home and work in order "to have the vehicles readily available for emergency response to agency needs," *id.* at 38a. See *id.* at 12a-13a, 36a-38a. The court concluded that those plaintiffs failed to proffer evidence of such a requirement, much less "evidence of restrictions or burdens on [them] during their commutes, such as prohibitions on personal stops or a requirement to monitor radio communications." *Id.* at 37a-39a. It further noted that those plaintiffs did "not claim back pay for emergency response activity" that they might have performed and that the "record is devoid of any facts concerning the regularity, aggregate duration, or time-keeping burden related to any emergency response activities." *Id.* at 39a & n.7. "In the absence of any alleged facts as to compensable work activity occurring during the[ir] commutes," the court held that the GS-9/11 plaintiffs had "not shown that any work during the[ir] commutes was more than *de minimis*." *Id.* at 39a-40a.

The court similarly concluded that the overtime claims of the GS-12 criminal investigators at issue in the 2004 summary judgment motions were without merit. Pet. App. 13a, 40a-58a. It explained that their claims were based solely on time spent commuting with a government vehicle between home and work in order to be

able to respond to emergencies, did not include any time performing activities other than driving, and did not include time associated with any emergency response. *Id.* at 41a & n.9, 56a-57a. While the GS-12 plaintiffs proffered evidence that they were required to monitor their radios and were prohibited from making personal stops during their home-to-work commutes, they presented "no evidence" of the "frequency, duration, or record-keeping difficulties" associated with "compensable work [that might have] occurred during their commutes." *Id.* at 57a-58a. Without evidence of such commuting-related work beyond a "*de minimis* threshold," the court held that the GS-12 plaintiffs failed to establish "facts necessary to establish the elements of a successful commuting time claim" because, under circuit law, "plaintiffs' commutes, by and of themselves, are not compensable merely because they take place in a government vehicle and facilitate emergency response from the plaintiffs' homes." *Ibid.*

b. The court of appeals affirmed. Pet. App. 1a-10a. After holding that it possessed appellate jurisdiction over appeals by all 6610 petitioners, *id.* at 2a-4a, the court concluded that the "plaintiffs' evidence does not demonstrate any ground for relief" under the court's prior decision in *Bobo* v. *United States*, 136 F.3d 1465 (Fed. Cir. 1998). Pet. App. 7a-9a.

In *Bobo*, the court had addressed a "basically identical claim" by Border Patrol K-9 officers who were required to commute to and from work in government cars and, during their commute, to monitor their radios, refrain from personal stops, and stop to walk their dogs as needed. Pet. App. 7a-8a. To determine whether the officers' home-to-work commute constituted compensable work as "an integral and indispensable part of the prin-

cipal activities" for which they were employed, *Bobo* adopted the Second Circuit's approach of examining a plaintiff's commuting activity in light of the degree to which the "activity is undertaken for the employer's benefit," the degree to which it is "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." 136 F.3d at 1467-1468 (quoting *Steiner* v. *Mitchell*, 350 U.S. 247, 256 (1956), and *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 650 (2d Cir. 1995)). Where the employee's work activity during the commute "is truly minimal, it is the policy of the law to disregard it." *Ibid.* (quoting *Reich*, 45 F.3d at 650).

The *Bobo* court ultimately held that, while compulsory restrictions were placed on the dog handlers' commutes that benefitted the Border Patrol and were closely related to the employees' principal work activities, those restrictions were negligible as a whole because their impact was "infrequent, of trivial aggregate duration, and administratively impracticable to measure." 136 F.3d at 1468. In light of *Bobo*, the court of appeals here held that petitioners' commuting time was similarly non-compensable because, under petitioners' evidence, any "labor beyond the mere act of driving the vehicle is *de minimis*." Pet. App. 8a-9a.

The court of appeals also rejected the claim that the commutes of the GS-12 plaintiffs were compensable under a "custom or practice" of compensating such time. Pet. App. 8a-9a. Whereas other categories of employees had been eligible for such compensation, the court explained that no actual custom or practice provided such pay to employees like the GS-12 plaintiffs and that "hypothetical customs or practices" that might have applied

had the plaintiffs been classified differently "do not suffice." *Id.* at 9a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review of this case is not warranted.

1. a. The court of appeals correctly determined that petitioners are not entitled to overtime compensation for commuting between home and work with government vehicles because petitioners failed to present evidence that their commutes involved any meaningful degree of compensable work.

Section 4(a)(1) of the Portal-to-Portal Act of 1947 distinguishes between an employee's time spent on principal "work" activities (that is, the "principal activity or activities which [an] employee is employed to perform"), for which the FLSA requires overtime pay, and non-compensable time spent "traveling to and from the actual place of performance" of such "principal activity or activities" before the employee's principal work activities begin or after they cease. 29 U.S.C. 254(a)(1). This Court has held that "any activity that is 'integral and indispensable' to a 'principal activity' is itself a 'principal activity' under § 4(a) of the Portal-to-Portal Act." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 29-30, 37 (2005) (citing *Steiner* v. *Mitchell*, 350 U.S. 247 (1956)).

The "integral and indispensable" test, however, is not satisfied whenever pre- or post-shift "activities are necessary for employees to engage in their principal activities." *IBP*, 546 U.S. at 40. All home-to-work commutes are "necessary" for an employee to perform the principal activity for which he is employed, yet it is undisputed that an employee's normal commute is not com-

pensable under the FLSA. Cf. 29 C.F.R. 785.35, 790.7(c); cf. also 5 C.F.R. 551.422(b). Even before Congress enacted the Portal-to-Portal Act to restrict the FLSA's application to travel time, this Court indicated that "traveling from workers' homes to [the workplace]" does not qualify as "work"—that is, activity both "controlled or required by the employer" and "pursued necessarily and primarily for the benefit of the employer and his business." See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 691-692 (1946) (citation omitted); cf. *Reich* v. *New York City Transit Auth.*, 45 F.3d 646, 651-652 (2d Cir. 1995) (applying this "concept of compensable work" to resolve dispute over home-to-work commuting). A home-to-work commute primarily benefits the employee because it accommodates the employee's choice of where to live; its duration is determined by that personal choice; and, when an employee elects to live farther from work (and accept a longer commute), that choice does not benefit the employer or his business.

In some circumstances, an employee may perform significant activities during a home-to-work commute that sufficiently alter its character to make it an "integral and indispensable" part of the employee's primary work activity that primarily benefits his employer. The court of appeals, like its sister circuits, has thus properly evaluated commuting-based overtime claims by weighing the degree to which activities associated with the employee's home-to-work travel are "undertaken for the employer's benefit," the degree to which they are "indispensable * * * to the primary goal of the employee's work," and the degree of "choice the employee has in the matter." *Bobo* v. *United States*, 136 F.3d 1465, 1467-1468 (Fed. Cir. 1998) (quoting and following

Reich, 45 F.3d at 650). Moreover, where the work-related aspects of an employee's commute are negligible in light of the commute's normal benefit to the employee, the courts of appeals have held the time spent in such commutes to be non-compensable. See *Bobo*, 136 F.3d at 1468; *Reich*, 45 F.3d at 650, 652-653 (commuting by K-9 officers required to transport their dogs between home and work was not compensable where work-related duties during commute were "neither substantial, nor regularly occurring"); *Aiken* v. *City of Memphis*, 190 F.3d 753, 758 (6th Cir. 1999) (following *Bobo* and *Reich* and holding that commutes by K-9 officers required to transport their dogs between home and work in city vehicles are not compensable where no "more than a de minimis amount of time during their commutes" was spent on work activities), cert. denied, 528 U.S. 1157 (2000).

The court of appeals correctly applied this analysis to hold that petitioners' home-to-work commutes are not compensable. It accepted that petitioners were required to commute between home and work in government-owned vehicles to enable them to respond to emergency calls at any time; were prohibited from using those vehicles to run personal errands; were required to monitor their radios during their commutes, and were required to carry government-issued weapons and other law-enforcement equipment. Pet. App. 2a. The court nevertheless concluded that petitioners' evidence failed to demonstrate that their "normal commutes"—that is, commutes in which petitioners were not called to respond to an emergency or otherwise deviate from their standard route between home and work—involved any "labor beyond the mere act of driving the vehicle" that might cross even a minimal threshold. See *id.* at 2a n.1,

7a-9a.[2] Indeed, as noted (pp. 4-5, *supra*), petitioners failed to present any evidence concerning the frequency or duration of any work-related activity beyond the normal act of commuting. On that record, the court correctly concluded that petitioners' commutes were not compensable as an integral and indispensable part of an activity primarily benefitting the employer.

b. Petitioners contend (Pet. 11-12, 13-14, 18, 24) that the court of appeals applied a test for determining whether travel is a "principal activity" under Section 4(a)(1) of the Portal-to-Portal Act that is different than the test for determining whether other preliminary or postliminary activities are "principal activities" under Section 4(a)(2), and that this "two-tiered approach to Section 4(a)" erroneously makes driving that is an "integral and indispensable" part of a principal work activity non-compensable unless an employee also performs other work while driving. Petitioners are incorrect.

First, nothing in the court of appeals' decision suggests that it interprets "principal activities" in Section 4(a)(1) differently than the same term in Section 4(a)(2). The court applied its prior decision in *Bobo* to the facts of this case, see Pet. App. 8a, and *Bobo* expressly invoked this Court's ruling in *Steiner* that an activity is compensable under Section 4(a) when it is "an integral and indispensable part of the principal activities for which covered workmen are employed." *Bobo*, 136 F.3d at 1467 (quoting *Steiner*, 350 U.S. at 256).[3]

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[2] Petitioners' settlements with the government have already compensated petitioners for time associated with petitioners' response to emergency or other calls that petitioners might have received while off-duty. See Pet. App. 41a & n.9.

[3] Petitioners contend (Pet. 23-24) that the court erroneously relied upon a 1996 amendment to 29 U.S.C. 254(a) concerning "activities

Second, petitioners misread the court's opinion as concluding that their commuting was an "integral and indispensable" part of their principal work activities. See Pet. App. 8a. The court concluded just the opposite after applying the Second Circuit's analysis in *Reich* to determine whether their commuting was an integral and indispensable part of their principal work activities. See *ibid.*; *Reich*, 45 F.3d at 649-651. *Reich* recognized that an activity can qualify as compensable work (or a part thereof) under the FLSA only if it is both "controlled or required by the employer" and is "*primarily for the benefit of the employer and his business.*" *Id.* at 650-651 (emphasis added) (quoting *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590, 598 (1944)). Commuting will not be done "primarily" for the employer's benefit and is not an integral and indispensable part of an employee's principal work activity where, as here, the work-related aspects of the commute are negligible in light of its benefit to the employee.

Petitioners argue (Pet. 18-19) that their commutes are an "integral and indispensable" part of their primary work activity because they must drive a government vehicle that could not be used for personal errands, monitor the radio, and carry a weapon in order to

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performed by an employee which are incidental to the use of [an employer's] vehicle for commuting." See Pet. App. 5a. The government advised the court of appeals in its response to petitioners' rehearing petition that the 1996 amendment does not apply to the particular context of this case. The amendment, however, appears only in the court's general discussion of the Portal-to-Portal Act, and it played no role in the court's holding, which was based exclusively on the analysis in *Bobo* and *Reich*, neither of which relies on the amendment. See *id.* at 7a-8a.

enable them to respond to emergency calls for work.[4] Petitioners' overtime claim, however, is only for normal commuting where no such response is at issue. Given that home-to-work commutes inherently benefit the employee, such routine drives to and from the employee's home do not primarily benefit an employer and are not compensable as work where, as here, any work-related activity beyond the normal act of commuting is sufficiently minimal. Cf. 29 C.F.R. 553.221(f) (use of patrol car to drive home and use on personal business is not work "even where the radio must be left on so that the officer can respond to emergency calls").[5]

While petitioners contend (Pet. 24-26) that the court of appeals applied a *de minimis* threshold in this case contrary to this Court's decision in *Anderson*, that contention does not bear scrutiny or merit this Court's review. *Anderson* concluded that "negligible" amounts of time performing work activities "may be disregarded" as *de minimis* under the FLSA. 328 U.S. at 692-693. This in no way precludes the use of an analogous type of rationale for determining whether certain activities have

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[4] Petitioners are required to carry or have readily accessible their government-issued weapon at all times. That obligation does not require the government to compensate petitioners for such time as "work."

[5] While petitioners assert (Pet. 20) that "even a significant, direct benefit to the employee" will not make an activity non-compensable under *IBP* and *Steiner*, neither case addressed the process of distinguishing between activities that primarily benefit the employer and those that do not. See *IBP*, 546 U.S. at 25, 32 (noting rule that activity must be "primarily for the benefit of the employer" to be work in case where litigants did not challenge ruling that donning and doffing unique protective gear was an "integral and indispensable" part of employees' principal work activity); *Steiner*, 350 U.S. at 252, 256 (no challenge to similar ruling).

negligible benefits for the employer in comparison to the benefit to, and the restrictions on, the employee. Cf. *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992); 29 C.F.R. 785.17 (on-call employee who uses time for own purposes is not working). Moreover, petitioners err in asserting (Pet. 26) that the court of appeals' analysis under *Bobo* undercounts the time spent on multiple work-related activities by failing to evaluate that time in the aggregate. *Bobo* demonstrates that the court considers both the frequency and "aggregate duration" of the work-related activities alleged, see 136 F.3d at 1468, and, in any event, petitioners proffered "no evidence" of either the "frequency" or "duration" of any such activity to support their claims. Pet. App. 57a-58a; cf. *id.* at 39a (no evidence of "regularity" or "aggregate duration" of any work activity during commutes).

c. Petitioners argue (Pet. 13-17) that review is warranted to resolve a circuit conflict over whether the "legal standard[]" to apply to "driving" claims under Section 4(a)(1) is whether that driving is an "integral and indispensable" part of an employee's principal work activities. No such conflict exists.

As noted (pp. 10-11, *supra*), the court of appeals applied this standard from *Steiner* in evaluating whether an activity is part of a principal work activity and did so in the specific context of work-to-home commuting, which does not normally primarily benefit the employer. In contrast, petitioners rely on decisions in which the litigants did not address whether (and could not reasonably have disputed that) the activity in question would primarily benefit the employer. Petitioners' cases instead focused on other aspects of the question whether preliminary or postliminary travel activity is an integral

and indispensable part of an employee's primary work activity. A number of those decisions concluded that an employee performs such an integral and indispensable activity when driving his employer's vehicle between the employer's staging area and a work site in order to transport heavy equipment, tools, or supplies essential for performing his and others' job duties at the site. Cf. 29 C.F.R. 785.38.[6] One reflects that travel at the end of the day necessary to maintain the tools used to do the employee's principal work can be compensable.[7] The

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[6] See, *e.g.*, *Secretary of Labor* v. *E.R. Field, Inc.*, 495 F.2d 749, 750-751 (1st Cir. 1974) (electrician hired to work at construction site works when driving employer's truck to transport necessary tools and equipment from employer's shop to jobsite); *Mitchell* v. *Mitchell Truck Line, Inc.*, 286 F.2d 721, 723-725 (5th Cir. 1961) (truck drivers hired to deliver construction materials work when driving trucks from employer's truck yard to loading facility and when returning to yard after dropping load at destination); *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 (10th Cir. 1958) (employees hired to perform services at oil well work when driving trucks that transport necessary heavy equipment back from well site to employer's base); cf. *Bonilla* v. *Baker Concrete Constr., Inc.*, 487 F.3d 1340, 1345 n.7 (11th Cir. 2007) (discussing unpublished and non-precedential decision holding that employees work when driving vehicles that transport necessary tools from employer's lot to work site), petition for cert. pending, No. 07-554 (filed Oct. 25, 2007). The same result holds true when an employee must transit from one employer-specified location to another in the middle of the workday. See *United Transp. Union Local 1745* v. *City of Albuquerque*, 178 F.3d 1109, 1118-1119 (10th Cir. 1999).

[7] See *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214 (10th Cir. 1998). *Baker* held that welders hired to perform welding services at a worksite must be compensated for the "travel time associated with refueling and restocking the welding rigs" if such travel is proven to be an integral and indispensable part of their principal work activity, *id.* at 1215-1217, and that a jury must decide whether it was necessary "to transport the rigs from the work site each day to refuel and restock" or whether such maintenance could be performed on site. *Id.* at 1219. Because *Baker*

issues implicated by an overtime claim based on circumstances materially similar to home-to-work commuting were thus never addressed or decided in those decisions, which themselves recognize that overtime claims are highly contextual and "must be decided upon [their] peculiar facts." See, *e.g.*, *DA&S Oil Well Servicing, Inc.* v. *Mitchell*, 262 F.2d 552, 554-555 & n.4 (10th Cir. 1958); accord *Baker* v. *Barnard Constr. Co.*, 146 F.3d 1214, 1218-1219 (10th Cir. 1998).[8]

d. Relevant regulatory guidance by OPM and DOL is likewise consistent with the decision of the court of appeals. Cf. Pet. 20-23. Petitioners rely heavily on Federal Personnel Manual Letter No. 551-10, which, without analysis, lists "certain situations where an employee may perform an activity * * * while traveling from home to work that could result in such travel time being considered hours worked." Pet. App. 66a, 68a. While the letter could be interpreted as supporting petitioners' position, OPM withdrew the letter when it abolished its

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concerned only "whether the travel associated with refueling and restocking the rigs" is compensable work, *ibid.*, it did not address whether a welder must be compensated for his commute home if he drives there after refueling and restocking.

[8] The Ninth Circuit, in a unpublished decision, has ruled that work foremen who were employed to drive their specially equipped company trucks to an out-of-town jobsite in order to transport equipment, tools, and crew members to the site each day must be compensated for driving the trucks back to town (often to their homes) because their employer required that they drive the trucks away from the worksite and prohibited them from returning the trucks to the company office in town. See *Dole* v. *Flint Eng'g & Constr. Co.*, 914 F.2d 262 (9th Cir. 1990) (Table). That decision is consistent with the outcome in this case, and, in any event, would not give rise to a circuit conflict warranting this Court's review because it has no precedential effect for future cases. See 9th Cir. R. 36-3(a).

Manual in 1993 (effective 1994). See *Nebblett* v. *OPM*, 237 F.3d 1353, 1358 (Fed. Cir. 2001). OPM's superseding guidance reflects the agency's view that home-to-work commuting can be compensable if an employee is required by his employer to do "productive work of a *significant* nature" during the commute beyond driving a government vehicle. See OPM, *Hours of Work for Travel* (visited Nov. 29, 2007) <http://www.opm.gov/oca/worksch/html/travel.asp> (emphasis added) (citing *Bobo*). DOL regulations addressing employment contexts inapplicable here likewise do not advance petitioners' cause because none addresses circumstances materially similar to home-to-work commuting where any work-related activity is *de minimis*.[9] In any event, even if regulatory guidance were both applicable and contrary to the decision of the court of appeals, such tension would not warrant this Court's review.

2. Petitioners argue (Pet. 28-30) that, even if their home-to-work commutes are not compensable as a principal work activity, they are nevertheless entitled to payment under a "custom or practice" at their employing agencies "in effect[] at the time of such activity," 29 U.S.C. 254(b)(2). The court of appeals properly rejected that argument, which does not warrant review.

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[9] See, *e.g.*, 29 C.F.R. 790.7(c) (mandatory after-hours travel "on the business of [the] employer" does not "ordinarily" fall within Section 4(a)), 790.7(d) (traveling "while performing active duties" specified by employer such as carrying "heavy equipment" not covered by Section 4(a)), 785.41 ("work" required to be performed while traveling is compensable; employee whose work is to "drive[]" a vehicle is working while traveling except during meal periods and when authorized to sleep); Wage & Hour Div., DOL, *Field Operations Handbook* § 31d00 (May 30, 1986) (addressing "special problems" applicable to employees employed to drive ambulances); *id.* § 31d00(a)(5).

Petitioners contend that OPM's (withdrawn) Federal Personnel Manual Letter No. 551-10 demonstrates the existence of a "custom or practice" of paying overtime to certain non-exempt employees for commuting similar to that claimed here, and argue that they must be compensated under that custom or practice because a 2003 settlement agreement between the GS-12 plaintiffs and the government states that, for purposes of litigating plaintiffs' remaining driving-time claims, the GS-12 plaintiffs "were FLSA non-exempt." C.A. App. A105. The court of appeals correctly concluded that any non-exempt employees who obtained such compensation were not similarly situated to petitioners, and that the government's stipulation that petitioners' claims for past work would not be exempt from the FLSA did not permit petitioners to recover based on "hypothetical customs or practices" that never applied to their job classification. Pet. App. 9a. Indeed, while some agencies may have adopted the OPM's (long-since-withdrawn) interpretive guidance to provide overtime compensation to certain employees, there was never any custom or practice of providing compensation for home-to-work commuting to anyone in petitioners' positions and grades.

Moreover, petitioners' practice-or-custom claim fails for at least two additional reasons. First, no custom or practice of providing pay beyond that required by statute can properly be imputed to the federal government. The terms of petitioners' appointment to federal service "were governed exclusively by statute," and employing agencies lack authority to establish customs or practices for petitioners' compensation beyond that authorized by Congress. See *Adams* v. *United States*, 391 F.3d 1212, 1221 (Fed. Cir. 2004), cert. denied, 546 U.S. 811 (2005); cf. Pet. App. 19a-23a, 36a. Second, the Portal-to-Portal

Act's custom-or-practice provision is an exception to the Act's provision relieving employers of overtime liability; it does not impose such liability under the FLSA as an original matter. See 29 U.S.C. 254(b). For the reasons previously discussed (pp. 8-10, *supra*), petitioners' time spent commuting would not qualify under the FLSA as compensable "work" primarily benefitting their employers.

The unusual nature of petitioners' claim of a custom or practice inferred via settlement agreement further counsels against certiorari. Petitioners claim no circuit split on this question, which is unlikely to recur with any frequency.

3. a. Finally, review is unwarranted because of the limited prospective importance of this case. Petitioners themselves explain (Pet. 6 & n.3) that they are criminal investigators whose compensation is no longer governed by the FLSA.[10] For the past 13 years, federal criminal investigators have been provided availability pay under 5 U.S.C. 5545a in lieu of compensation under the FLSA's overtime provisions. See 29 U.S.C. 213(a)(16); cf. H.R. Conf. Rep. No. 741, 103d Cong., 2d Sess. 57 (1994) (Congress enacted new pay regime, among other things, to "prevent litigation" on overtime claims). Thus, while the question of FLSA overtime pay for home-to-work commuting may have prospective importance for employees outside federal criminal law enforcement, the context-specific nature of such FLSA claims counsels against review here.

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[10] As noted (at note 1, *supra*), we accept petitioners' representation that they are criminal investigators for purposes of this brief. We are unable to independently determine from the record on appeal whether any petitioner has asserted claims based on employment other than as a criminal investigator.

b. Additionally, while the government has not cross-petitioned from the judgment of the court of appeals, the court erred to the extent it exercised appellate jurisdiction over the claims of more than two of the 6610 petitioners. Cf. Pet. App. 2a-4a. Jurisdictional defects in petitioners' notices of appeal deprive this Court of jurisdiction to review petitioners' case in its entirety and significantly restrict the relief that this Court could grant on review.

The "time limits for filing a notice of appeal are jurisdictional," *Bowles* v. *Russell*, 127 S. Ct. 2360, 2362, 2366 (2007), and Appellate Rules 3 and 4 are "linked jurisdictional provisions" that govern the filing of a notice of appeal. *Becker* v. *Montgomery*, 532 U.S. 757, 765 (2001). As is relevant here, Rule 3(c)(1) requires that the "notice, *within Rule 4's timeframe*, must * * * specify the party or parties taking the appeal." *Id.* at 765 (emphasis added). While a timely notice will sufficiently do so if the appellants' identities are "objectively clear" from the notice, *id.* at 766-767; Fed. R. App. P. 3(c)(4), petitioners' notices fall short of this standard.

The two notices of appeal here identified the appellants as, respectively, "plaintiff Steven S. Adams and 6,479 additional plaintiffs" and "plaintiff James J. Aaron and 129 additional plaintiffs." See Joint Notices of Appeal (filed Dec. 19, 2005). Because there are more than 14,000 plaintiffs in these consolidated cases and the plaintiffs' previous court filings never identified which individual plaintiffs were affected by the Rule 54(b) judgment below, we know of no way to have reasonably identified from the record which plaintiffs were encompassed by the notices' (potentially overlapping) groups of "6,479 additional plaintiffs" and "129 additional plaintiffs."

The court of appeals did not conclude otherwise. It held that the appellants' identities later *became* "objectively clear" when petitioners' counsel filed an appearance in the court of appeals with an appendix listing all 6610 petitioners. Pet. App. 3a-4a & n.3. That appearance, however, was filed *after* the relevant 60-day appeal period had expired. Petitioners did not, "within Rule 4's timeframe," sufficiently identify any "parties taking the appeal" other than Steven Adams and James Aaron. This Court's jurisdiction thus properly extends only to those two petitioners.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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